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Nos. 78-232 and 78-5218

WILLIAM HOWARD TAFT, JR., CLERK

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In the Supreme Court of the United States  
OCTOBER TERM, 1978

RUSSELL BUFALINO, PETITIONER

v.

UNITED STATES OF AMERICA

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MICHAEL SPARBER, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITIONS FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

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BRIEF FOR THE UNITED STATES  
IN OPPOSITION

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-13a)<sup>1</sup> is reported at 576 F. 2d 446. The opinion and order of the district court denying the motion to suppress (Pet. App. 14a-25a) is reported at 432 F. Supp. 651.

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<sup>1</sup>"Pet. App." refers to the appendix to the petition in No. 78-232.

## JURISDICTION

The judgment of the court of appeals was entered on May 2, 1978. A petition for rehearing was denied on July 10, 1978 (Pet. App. 28a-29a). The petitions for a writ of certiorari were filed on August 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the testimony of the chief prosecution witness and tapes of petitioners' conversations should have been suppressed because discoverable back-up tapes of the conversations were destroyed by a government agent.
2. Whether spectator activity during the trial constituted impermissible contact with the jurors, so as to require reversal of petitioners' convictions.
3. Whether the imposition of consecutive sentences for the conspiracy and substantive offenses designated in 18 U.S.C. 894 violated the Double Jeopardy Clause.
4. Whether the government's expenditure of \$46,000 on its chief witness in connection with his participation in the Witness Relocation Program constituted a violation of petitioners' due process rights.

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to use extortionate means to collect an extension of credit and participating in the use of extortionate means to collect an extention of credit, in violation of 18 U.S.C. 894. Petitioner Bufalino was sentenced to four years' imprisonment on the conspiracy count to be followed by five years' probation on the substantive count. He was also fined \$10,000 on each

count. Petitioner Sparber was sentenced to one year's imprisonment on the conspiracy count to be followed by five years' probation on the substantive count. The court of appeals affirmed (Pet. App. 1a-13a).

1. The evidence adduced at trial showed that in February 1976, Herbert Jacobs, a New York jeweler, sold Jack Napoli, on credit, jewelry worth approximately \$25,000 (Tr. 66-71). When Napoli failed to pay for the jewelry, Jacobs told him that he wanted his money and that if Napoli "didn't do the right thing, [he] was going to get hurt" (Tr. 86). After Napoli continued in default, Jacobs told him "it was going to be out of his hands pretty soon, he wasn't going to hold anybody off any longer and he wanted the money and he better get paid" (Tr. 87). Jacobs then went to petitioners Bufalino and Sparber for help in collecting the debt (Pet. App. 3a).

Shortly thereafter, petitioner Sparber called Napoli and told him that if Napoli didn't repay the debt or return the jewelry, Sparber was going to burn his house down and that "he didn't care who got hurt" (Tr. 90). Sparber subsequently called again and told Napoli, "You better get things squared away if you don't want get hurt. But you better come up with the merchandise or the money" (*id.* at 91). Sparber attempted to get Napoli to meet with him (*ibid.*), but instead Napoli went to Florida to meet with Bufalino directly, in an effort to settle the matter (Tr. 92). Bufalino ordered Napoli to pay the debt and to meet with Sparber in New York (Tr. 96-101).

Knowing that he would not be able to come up with the money and frightened by the threats, Napoli then contacted the FBI (Tr. 101). The FBI outfitted him with recording and transmitting devices, and Napoli subsequently recorded various telephone and face-to-face conversations between himself and petitioners. During the

surveillance period, Sparber and Bufalino warned Napoli that he would be subjected to bodily harm if he failed to pay the debt (Tr. 102, 113-118). Bufalino told Napoli that if he didn't "do the right thing here," Bufalino was going to kill him (Tr. 122-124). Jacobs later assured Napoli over the telephone that "as long as everything gets straightened out, nobody will kill you" (Tr. 205).<sup>2</sup>

2. Prior to trial, petitioners moved to suppress Napoli's testimony and certain recordings of their conversations with Napoli. The evidence adduced at the pre-trial suppression hearing is related in detail, in the opinion of the district court, denying the motion to suppress (Pet. App. 16a-18a) and may be summarized as follows: On three occasions in April 1976, during the course of the investigation of this case, FBI agent Stephen Edwards equipped Napoli with devices that recorded and transmitted conversations between Napoli and various individuals, among them petitioners Bufalino and Sparber. These devices included a Nagra tape recorder and a Kel transmitter, through which Napoli's conversations were monitored by FBI agents at several nearby locations. The agent recorded the Kel transmissions as they were broadcast over radio receivers.

Agent Edwards, who monitored the three conversations, listened to all of the tapes. He testified that the Nagra recordings were all superior to the Kel transmission recordings, which he said were largely inaudible. This result conformed to his experience that Nagra recordings are consistently more audible than recordings of Kel transmissions.

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<sup>2</sup>Jacobs was convicted with petitioners of violating 18 U.S.C. 894. He was sentenced to three years' probation and fined \$2,500.

Edwards testified that his principal purpose in using the Kel transmitter was to monitor the conversations and to be able to step in to protect Napoli in the event of danger. He stated that taping the Kel transmissions was strictly a secondary, back-up procedure in the event the Nagra device malfunctioned. Having compared the recordings and found the Nagra recordings to be superior, he concluded that there was "absolutely no use for [the Kel recordings]." He believed it to be standard FBI procedure to destroy such tapes, and after consulting with other agents, he disposed of them about a week after they were made.

#### ARGUMENT

1. Both petitioners contend (Bufalino Pet. 7-9; Sparber Pet. 15-16) that Napoli's testimony and the tapes of their face-to-face conversations with Napoli should have been suppressed because of the destruction of the back-up tapes, which were discoverable under Fed. R. Crim. P. 16 and producible under the Jencks Act, 18 U.S.C. 3500. The district court found, however, that the back-up tapes were "largely inaudible" and exceedingly inferior in quality to the Nagra recordings, which were of a relatively high quality. The district court further found (Pet. App. 19a) that the Nagra machine was neither turned off nor tampered with during the conversations and that the resulting recordings were continuous and complete reflections of those conversations. Furthermore, the district court found "no reason to believe that any material on the [back-up] tapes which might have clarified some of the inaudible portions of the Nagra tapes, assuming such material existed, would have been favorable to the defense, in view of the nature and content of the Nagra recordings" (Pet. App. 20a). While, as both courts below held, the back-up tapes should not have been destroyed (Pet. App. 5a-6a), the failure to

retain the tapes in this case did not require the suppression of evidence, since it was clear that the tapes were not destroyed in bad faith and that they would not have aided petitioners' case if they had been preserved. As the Second Circuit stated in *United States v. Miranda*, 526 F. 2d 1319, 1329 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976), suppression "would be an unduly heavy sanction to impose upon the Government for the loss of a piece of evidence concerning a subject on which there was other primary evidence available and adduced." See also *United States v. Shafer*, 445 F. 2d 579, 582 (7th Cir. 1971); cf. *United States v. Bryant*, 439 F. 2d 642, 653 (D.C. Cir. 1971).

In *United States v. Well*, 572 F. 2d 1383 (9th Cir. 1978), relied on by petitioners, the Ninth Circuit held that sanctions are required when Jencks Act material is destroyed, even in the absence of a showing that the defendant is prejudiced by the loss of the material. In *Well*, however, the tape destroyed was the only available recording; the court made it clear that its holding was limited to cases, unlike this one, in which "the information in the destroyed statement is not otherwise available." *Id.* at 1384, citing *United States v. Carrasco*, 537 F. 2d 372, 376-377 n. 2 (9th Cir. 1976). In *United States v. Harrison*, 524 F. 2d 421 (D.C. Cir. 1975), on which petitioners also rely, the District of Columbia Circuit warned against the routine destruction of rough notes of witness interviews. There is nothing in that opinion, however, to suggest that the court would impose sanctions in a case in which it was found that the defendant was not prejudiced by the destruction of the notes—particularly where, as here, the destroyed material was duplicated by other material of the same nature. Indeed, in the subsequent case of *United States v.*

*Quiovers*, 539 F. 2d 744 (D.C. Cir. 1976), the court looked to the "total circumstances"—and, in particular, the lack of a showing of prejudice—in declining to dismiss an indictment because of government destruction of discoverable tape recordings.

2. At the opening of the third day of trial, the court and counsel were informed by a deputy clerk that (Tr. 226-227):

The jurors called me into their room and they said they are quite nervous. They seem to, every time they go in, or out a couple of the spectators are glaring at them. They said no matter where they went they kept bumping into these people, elevators, outside.

After discussing the problem with counsel the court decided to conduct a *voir dire* of the jurors individually in chambers outside the presence of counsel. No objection was made to that procedure (Pet. App. 9a). The *voir dire* (Tr. 231-244) showed that nine of the jurors had heard no statements from the spectators and had noticed no unusual spectator activity. Four reported that some of the spectators either stared at them as they went in and out of the jury box or tried to make eye contact with them, and two reported that they had rebuffed efforts by a spectator to start a conversation with them in the hall. All the jurors who said they had seen or heard about spectator activity were asked if anything had happened that would affect their judgment. All responded with express denials except for one, who said cryptically that "I am for law and peace" and denied that she was "in any fear about the situation" (Tr. 231-234).<sup>3</sup> After reviewing the court's

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<sup>3</sup>That juror did not, as petitioner Bufalino maintains (Bufalino Pet. 6), indicate that the spectator activity would interfere with her ability to decide the case fairly.

report on the *voir dire*, petitioners moved for a mistrial, which was denied. Relying on *Remmer v. United States*, 347 U.S. 227 (1954), petitioners contend (Bufalino Pet. 9-11; Sparber Pet. 17-20) that the denial was error.

In *Remmer*, an unnamed person told one of the jurors that he could profit by bringing in a verdict favorable to the defendant. In remanding the case for a hearing to determine whether the defendant was prejudiced by this contact, the Court held that any unauthorized "private communication, contact or tampering" with a juror "during a trial about the matter pending before a jury" is presumed to be prejudicial, and a new trial must be granted unless the government can establish that the contact was harmless. 347 U.S. at 229. In this case, as the court of appeals noted, the "contacts" were limited to "laughs, stares, rebuffed efforts to start conversations and the entry of an unidentified female into the jurors' bathroom following a plumbing breakdown elsewhere in the building" (Pet. App. 10a). This degree of contact does not rise to the level of "private communication, contact or tampering" required to trigger the presumption of prejudice to the defendant. As the court of appeals further observed, "[A]ny public trial can be expected occasionally to involve comparable incidents, and the district court's description of some of the perpetrators as 'husky and menacing looking' does not of itself create a *Remmer* presumption of prejudicial contact.<sup>4</sup> (Pet. App. 10a). In

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<sup>4</sup>The instant case is clearly distinguishable from *United States v. Ferguson*, 486 F. 2d 968 (6th Cir. 1973), and *Stone v. United States*, 113 F. 2d 70 (6th Cir. 1940). In *Ferguson*, a friend of the defendant made comments to a juror favorable to the defendant and specifically discussed an aspect of the case. In *Stone*, a former assistant of defendant's attorney attempted to bribe a juror.

light of the district court's finding that "no juror was intimidated or resentful" (Tr. 1023), the court properly refused to order a mistrial.<sup>5</sup> See *United States v. Bracco*, 516 F. 2d 816, 819 (2d Cir.), cert. denied, 423 U.S. 860 (1975).

3. Petitioner Bufalino further contends (Bufalino Pet. 11-12) that the consecutive sentences he received for the substantive and conspiracy offenses under 18 U.S.C. 894 violated the Double Jeopardy Clause. It is well-settled, however, that a substantive offense and a conspiracy to commit that offense are separate crimes that can be separately punished. See *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *United States v. Feola*, 420 U.S. 671, 693 (1975); *Callanan v. United States*, 364 U.S. 587, 593 (1961); *Pinkerton v. United States*, 328 U.S. 640, 643-644 (1946). The rationale of that principle applies not only to prosecutions under the general federal conspiracy statute, 18 U.S.C. 371, but also to prosecutions under special conspiracy provisions such as the one contained in Section 894. A substantive violation of Section 894 requires proof that the defendant participated in the use of extortionate means to collect an extension of credit, while a conspiracy offense under Section 894 requires proof that the defendant agreed with others to use or attempt to use extortionate means to collect an extension of credit. Since each offense contains at least one element not present in the other, the

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<sup>5</sup>Petitioner Sparber also contests the district court's refusal to grant his request, made after the judge's charge, to examine the alternate jurors concerning spectator activity (Sparber Pet. 18). The court replied that the appropriate time for such questioning had long since passed. Petitioners had ample opportunity to request supplemental inquiries after they received a transcript of the interrogation, rather than waiting to make such a request until the jury retired to consider its verdict.

two constitute separate offenses for the purpose of double jeopardy analysis. See *Blockburger v. United States*, 284 U.S. 299 (1932).<sup>6</sup>

4. Finally, petitioner Bufalino contends (Pet. 12-15) that the government acted improperly in spending \$46,000 in connection with Napoli's participation in the Witness Relocation Program, and that the indictment should be dismissed for that reason.

This claim provides no basis for dismissing the indictment. The \$46,000 that petitioner characterizes as tantamount to a bribe was expended to feed, clothe, house, and pay medical expenses for a family of five over the 15-month period that they were under government protection, and to move them and their household effects on three separate occasions in response to threats on Napoli's life. In no sense was the sum paid to Napoli a type of "contingent fee" such as that criticized in *Williamson v. United States*, 311 F. 2d 441 (5th Cir. 1962). There, a government informant was offered payment to produce evidence against particular defendants with respect to crimes not yet committed. In this case, at the time Napoli contacted the FBI he had repeatedly been threatened by petitioners; the promises

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<sup>6</sup>Neither *Jeffers v. United States*, 432 U.S. 137 (1977), nor *Simpson v. United States*, 435 U.S. 6 (1978), aids petitioner's cause. In both cases this Court held that the statutes pursuant to which cumulative sentences were imposed prohibited precisely the same conduct. That situation, as we have shown, does not obtain here. The substantive and conspiracy offenses enumerated in Section 894 are closely analogous to the substantive and conspiracy offenses enumerated in the Hobbs Act, 18 U.S.C. 1951. This Court has held those offenses can be separately charged and punished. *Callanan v. United States*, *supra*.

made to Napoli were simply the standard promises of relocation that are regularly made to participants in the Witness Relocation Program.<sup>7</sup>

At trial the district court allowed petitioners broad latitude to probe Napoli's background and motives, and considerable testimony was elicited relating to his participation in the Witness Relocation Program. Moreover, the court properly instructed the jury that it could take Napoli's relationship with the government into consideration in assessing his credibility (Tr. 991). Accordingly, Napoli's participation in the Witness Relocation Program violated none of petitioners' rights, and the credibility of Napoli, as a government informant was properly left to the trier of fact. See *On Lee v. United States*, 343 U.S. 747, 757-758 (1952); *United States v. Henderson*, 422 F. 2d 454, 456 (6th Cir. 1970).

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<sup>7</sup>There is nothing in the record to support petitioner's allegation (Bufalino Pet. 13) that the United States marshals assisted Napoli in the commission of a crime. As for the government's bringing his cooperation to the attention of sentencing judges in state prosecutions, this is a routine procedure which a cooperating individual can reasonably expect whether promised or not.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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